Service Date: December 21, 2004

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF the Application of	)	UTILITY DIVISION
MCImetro Access Transmission Services, LLC	)	
and	)	
Qwest Corporation	)	DOCKET NO. D2004.7.119
Pursuant to Section 252(e) of the	)	ORDER NO. 6611
Telecommunications Act of 1996 for Approval	)	
of their Interconnection Agreement	)	

FINAL ORDER

Introduction and Procedural Background

1. On February 8, 1996, the Telecommunications Act of 1996 (1996 Act)[1] was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to the local exchange markets. The 1996 Act sets forth methods by which local competition may be encouraged in historically-monopolistic local exchange markets. The 1996 Act requires companies like U S WEST Communications, Inc., now known as Qwest Corporation (Qwest), to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251 and 252.

2. Qwest and MCI entered into an interconnection agreement for interconnection of Qwest services according to the 1996 Act. On July 16, 2004 Qwest filed a copy of the agreement with the Montana Public Service Commission (PSC or Commission) for "informational purposes only." On July 30, 2004 MCI submitted a copy of the agreement for review and approval pursuant to 47 U.S.C. §252. Qwest moved to dismiss MCI's filing. AT&T moved to intervene and objected to Qwest's motion to dismiss, as did MCI.

3. The PSC denied Qwest's motion to dismiss MCI's filing and on October 15, 2004

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

the PSC issued a Notice of Filing and Opportunity to Intervene and Comment, giving public notice of the requirements that the Commission must approve the Agreement unless it finds the Agreement discriminates against other telecommunications carriers not parties to the agreement, or is not consistent with the public interest, convenience and necessity. The notice stated that no public hearing was contemplated unless requested by an interested party, and that interested persons could submit limited comments on whether the agreements met these requirements.

4. On November 9, 2004 Qwest filed an objection to the Commission's Notice of Application for Approval of the Interconnection Agreement, in which Qwest objected to the Commission's jurisdiction to review the agreement.

5. No hearing has been requested and no comments or requests for intervention were received.

Applicable Law and Commission Decision

Filing requirements of Interconnection Agreements under 47 U.S.C. §252

6. On April 23, 2002, Qwest filed a petition for a declaratory ruling with the Federal Communications Commission (FCC), seeking a ruling on the scope of the mandatory filing requirement set forth in section 252(a)(1) of the Act (Declaratory Ruling).[2]

7. In its petition to the FCC, Qwest argued that under Section 252(a)(1) a negotiated agreement should be filed for state commission approval only if it includes (i) a description of the service or network element being offered; (ii) the various options available to the requesting carrier and any binding contractual commitments regarding the quality or performance of the service or network element; and (iii) the rate structures and rate levels associated with each such option. Declaratory Ruling, ¶2.

8. Qwest argued in its petition to the FCC that agreements regarding elements that have been removed from the national list of elements subject to mandatory unbundling should not be required to be filed under 252(a)(1). Declaratory Ruling ¶3.

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[2] Qwest Communications International Inc., *Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, released October 4, 2002.

9. In the Declaratory Ruling the FCC declined to establish an exhaustive, all-encompassing "interconnection agreement standard" and encouraged state commissions to decide in the first instance which sorts of agreements fall within the statutory standard. Declaratory Ruling, ¶10-11.

10. The FCC found that agreements containing an ongoing obligation relating to §251(b) or (c) must be filed under §252(a)(1). Declaratory Ruling, footnote 26.

11. On March 12, 2004, the FCC issued a Notice of Apparent Liability For Forfeiture (NAL) against Qwest, in which the FCC found that fines in the amount of 9 million dollars were appropriate for Qwest's failure to file interconnection agreements with state commissions as required by 47 U.S.C. §252. In the NAL, the FCC interpreted its Declaratory Ruling of 2002, and reiterated that "on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions." (NAL ¶11, citing Declaratory Ruling ¶8.)

12. In the NAL the FCC imposed fines on Qwest in part for Qwest's failure to file an Internetwork Calling Name Delivery Service Agreement (ICNAM) for review and approval. NAL ¶13. The FCC concluded that the ICNAM agreement was required to be filed because it did not appear on its face to fall within one of the filing requirement exceptions set forth in the Commission's Declaratory Ruling, and accordingly it should have been filed for review and approval by the appropriate state commission. NAL, ¶13.

13. In the NAL the FCC stated that while §252(a)(1) is explicit in its filing requirements, the declaratory ruling provided certainty to those requirements by stating that any agreement creating an ongoing obligation and pertaining to the requirements of §251 is an interconnection agreement that must be filed with the state commission. NAL ¶22.

14. The FCC stated that interconnection agreements must be filed with the state commissions so that Qwest's competitors are able to opt into these agreements, and concluded that "Section 252(a)(1) is not just a filing requirement. Compliance with Section 252(a)(1) is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors." NAL, ¶¶31, 46.

15. The Commission finds persuasive the FCC's statement in its Declaratory Ruling

that "the state commissions should be responsible for applying in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements." Declaratory Ruling ¶7. The FCC declined to establish an exhaustive, all-encompassing interconnection agreement standard, leaving it to the state commissions to decide in the first instance whether a specific agreement should be filed under §252. Declaratory ruling ¶10.

16. The agreement between Qwest and MCI pertains to the obligations a carrier has under §251, and the agreement is subject to the filing requirements of §252. The statutory language of 47 U.S.C. §252(e) is clear on its face: *any* interconnection agreement shall be filed with the state commission for review and approval. The FCC has stated that an agreement relating to §251(b) or (c) must be filed with a state commission for approval (Declaratory Ruling footnote 26) and that any agreement pertaining to unbundled network elements must be filed pursuant to §252(a)(1). (NAL ¶22, citing the declaratory ruling ¶8.)

17. The agreement between Qwest and MCI unquestionably pertains to the obligations Qwest has to open its network to its competitors under §251, and as a result the agreement is a public agreement subject to the filing requirements of §252.

18. Finally, the FCC has clearly left it to each state commission to determine in the first instance whether a specific agreement is to be filed under §252. Declaratory ruling ¶7, ¶¶10-11. The Commission finds that Qwest and MCI's agreement has been properly filed with the Commission by MCI, and that the agreement is thereby available to competitors as a matter of law. Requiring the agreement to be filed under §252 accomplishes the objectives of the Act, as reiterated by the FCC in its NAL, that filing of interconnection agreements under §252 is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors. The Commission finds that it is critical to ensure this protection is afforded to competitors operating in the Montana market, and consequently finds that the agreement between Qwest and MCI must be filed under §252, resulting in its availability to all of Qwest's competitors as a matter of law.

Commission Approval of the Agreement

19. Having concluded that the agreement filed with the Commission by Qwest and MCI is an interconnection agreement subject to the filing requirements of §252, the Commission has reviewed the agreement for compliance with the Act. The standards for approving an interconnection agreement differ, depending on whether the agreement has been voluntarily negotiated or has been arbitrated by a state commission. 47 U.S.C. § 252(e)(2). The Agreement submitted for approval in this proceeding was negotiated voluntarily by the parties and thus must be reviewed according to the provisions in 47 U.S.C. § 252(e)(2)(A).

20. The Commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by voluntary negotiation:

> (2) GROUNDS FOR REJECTION. – The State commission may only reject –
>
> (A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(a)] if it finds that
>
> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
>
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity[.]

21. Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the Commission's authority is preserved in § 252(e)(3) to establish or enforce other requirements of Montana law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to § 253 of the 1996 Act, which does not permit states to impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

22. Unlike an agreement reached through arbitration, a voluntarily negotiated agreement need not comply with standards set forth in §§ 251(b) and (c). 47 U.S.C. §§ 251(b), 252(c) and 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and that are not determined according to the pricing standards included in § 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission.

23. By approving this Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that §§ 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

24. No comments have been received that indicate the Agreement does not comply with federal law as cited above or with state telecommunications requirements. The Montana Consumer Counsel, who represents the consumers of the State of Montana, has not intervened in this approval proceeding, and has not filed comments to indicate that any portion of the Agreement is not consistent with the public interest, convenience and necessity. There have been no objections raised that the Agreement discriminates improperly or is not consistent with the public interest, convenience and necessity.

25. The Commission finds that the terms in the Agreement appear to conform to the standards required by the Act and should be approved. In approving this Agreement, the Commission is guided by provisions in state and federal law that have been enacted to encourage the development of competitive telecommunications markets. Section 69-3-802, MCA, for example, states that it is the policy of the State of Montana to encourage competition in the telecommunications industry and to provide for an orderly transition to a competitive market environment.

26. MCI and Qwest can agree that nothing in their Agreement prohibits certain conduct, but if that conduct otherwise violates the law, the provision in the Agreement that sanctions such conduct is void. §§ 28-2-604, 28-2-701, 28-2-702, MCA. Any provision or term of this Agreement that is in conflict with the law, whether or not specifically addressed by the Commission, is rejected as a matter of law and not in the public interest.

27. The Commission rejects those portions of the agreement that do not conform with the requirements the Commission has imposed on previous interconnection agreement as being in the public interest. Specifically, the Commission requires the parties add the following language to the agreement required in previous interconnection agreements filed in Montana:

> If Qwest elects to disconnect MCI, Qwest must notify MCI and the Commission of such disconnection thirty (30) days prior to the effective date of the

> disconnection. Immediately upon receipt of such notice, MCI agrees to inform its end-user customers in writing that service will be disconnected on the date specified in Qwest's notice to MCI for MCI's failure to make payments due. Qwest shall not disconnect an end user customer without first obtaining the approval of the Commission.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. Qwest is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the* Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

4. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

5. The Commission finds that the agreement between MCI and Qwest is a negotiated interconnection agreement subject to the requirements of 47 U.S.C. §252(a)(1).

6. The Commission has jurisdiction to approve the agreement negotiated by the parties and submitted to the Commission according to § 252(e)(2)(A). Section 69-3-103, MCA.

7. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements.

8. The Commission may reject a portion of a negotiated agreement and approve the remainder of the agreement if such action is consistent with the public interest, convenience and necessity and does not discriminate against a carrier not a party to the agreement. 47 U.S.C. § 252(e)(2)(A).

Order

THEREFORE, based upon the foregoing, it is ORDERED that the Agreement of the parties submitted to this Commission for approval pursuant to the 1996 Act is approved subject to the following condition:

The parties shall file an amendment subject to the terms and conditions set forth in Paragraph 28 of this Order. The remainder of the agreement is approved.

The parties shall file subsequent amendments to the Agreement with the Commission for approval pursuant to the 1996 Act.

IT IS FURTHER ORDERED that AT&T's motion to be dismissed from this docket is granted.

DONE AND DATED this 14th day of December 2004, by a vote of 4 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
BOB ROWE, Chairman, abstaining

_____
THOMAS J. SCHNEIDER, Vice Chairman

_____
MATT BRAINARD, Commissioner

_____
GREG JERGESON, Commissioner

_____
JAY STOVALL, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.